COURT NO.2

THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Appeal from Order No. 127 of 2001

{F.A.F.O. No 33 of 1996}

New India Assurance Co. Ltd. **… Appellant.**

Versus

Smt. Shashi Lata
and others. **… Respondents.**

Coram: Hon'ble P.C. Verma, J.
Hon'ble B.S. Verma, J.

This appeal has been preferred under Section 173 of the Motor Vehicles Act, 1988 **(*in short the Act*)** against the judgment and Award, dated 29-11-1995, passed in M.A.C.T. Petition No. 141 of 1990, Smt. Shashi Lata and others Vs. Sri Mehandi Hasan and another, by the Motor Accident Claims Tribunal/II Addl. District Judge, Nainital ***(hereinafter referred to as the Tribunal)***, whereby the learned Tribunal has awarded a sum of Rs. 2,40,000/- along with simple interest @ 12% per annum and directed the O.P.No. 2-appellant to pay the same. Aggrieved, the Insurance Company-O.P.No.2 has come up in appeal with a prayer to set aside the impugned judgment and award mainly on the ground that the truck was not involved in the accident, thereby challenging the finding on rash and negligent driving of the vehicle as well as challenged the quantum of compensation and that the findings of the learned Tribunal are not based on evidence on record.

We have heard learned counsel for the appellant, Mr. T.A.Khan as well as learned counsel for the claimant-respondent no.1 to 5, Mr. Sanjay Kaushik, and have carefully gone through the entire material on record including the impugned judgment and award.

Brief facts of the case are that Ashok Kumar Singh Pathania (***the deceased***) has died in a motor accident on 18.1.1990 at about 5.30 p.m. near I.T.I. Kashipur involving Truck No. U.R.J.-462. Claim petition has been preferred by his dependents and legal heirs. The truck involved in the accident was duly insured with the appellant on the date of accident. Both the opposite parties no. 1 and 2, owner and insurer of the vehicle contested the claim petition on different grounds. The appellant-Insurance company has asserted in its written statement that the company is liable to pay compensation worth Rs. 1,50,000/- alone, for which the claimants must prove that there was no breach of policy conditions. The Tribunal framed necessary issues in the case. After considering the entire material before it, it has been found by the Tribunal that the accident in question was caused due to rash and negligent driving by the driver of the offending truck No. URJ-462 and it was not a case of own negligence of the deceased. It may be mentioned here that the Tribunal has not recorded any finding regarding the liability of the Insurance Company to the limited extent of Rs. 1,50,000/- as pleaded by it in the written statement. On Issue No.3, the learned Tribunal has considered the oral and documentary evidence on record and has not accepted the income of the deceased, i.e. Rs. 7,000/- as stated by the claimant no.1, Shashi Lata, in the witness box, who has also stated that the deceased used to give Rs. 5,000/- for family expenses. Witness Hira Singh, P.W.2, examined on behalf of the claimants, has stated that the deceased used to save Rs. 9-10 thousand per year. Ultimately, the Tribunal has assessed loss of dependency at Rs.36,000/- per annum. The deceased was taken to be aged 50 years on the basis of Post Mortem Report, therefore, as per provisions of Second Schedule of Section 163-A of the Act, the Tribunal has applied multiplier of ***10*** to work out the

total loss of dependency, which comes to 36,000 x 10= Rs. 3,60,000/-. Moreover, out of this amount, the Tribunal has deducted 1/3rd on account of lump-sum payment of compensation to the claimants. Thus, 3,60,000 – 1,20,000 = Rs. 2,40,000/- has been determined as just amount of compensation. accordingly, the Tribunal has passed the impugned judgment and award, as mentioned earlier.

Learned counsel for the appellant has submitted before us the only point that the Tribunal has not recorded any finding on the point that the Insurance Company has liable to pay the fixed compensation in view of its limited liability to the tune of Rs. 1,50,000/-, as pleaded in the written statement filed before the Tribunal. It may be noticed here that no such ground has at all been taken in the memo of appeal, as indicated in the very first paragraph above. The grounds of challenge relate to only rash and negligent driving and quantum of compensation. Both there grounds are not open for the appellant in the appeal in view of the well settled law of the Hon'ble Supreme Court in the case of of ***"Nainital Insurance Company Ltd. Chandigarh Vs. Nicolletta Rohtagi and others" [((2002) 7, Supreme Court Cases, 456].*** In that case, it has been observed by the Apex Court that ***"even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regard negligence or contributory negligence of the offending vehicle".*** Thus, in view of the law laid down by the Apex Court reported in ***(2002) 7, S.C.C. 456 (supra),*** which is fully applicable in the present appeal, none of the contentions raised on behalf of the appellant is tenable and has to be ignored outright.

So far as the argument of the learned counsel for the appellant that the Insurance Company was liable to pay the fixed compensation in view of its limited liability to the tune of Rs. 1,50,00/- as pleaded in the written statement filed before the Tribunal is concerned, we are of the consistent view that even this argument has no force at all. Learned counsel could not show to us how the provisions of Section 95(2) of the Motor Vehicles Act, 1939 are applicable to the present case. In the present case, it is admitted fact that the accident in question occurred on 18.1.1990. The 1988 Act came into force with effect from the 1st day of July, 1989. Section 147 of Act deals with requirements of policies and limits of liability. Proviso to sub-Section (2) lays down that ***"Provided that any policy of the insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier."*** In view of this clear provision law, especially when in the present case, provisions of law new Act of 1988 are applicable, the argument advanced by the learned counsel is totally misconceived ant not tenable.

Ultimately, we are of the view that the present appeal is devoid of merit and must fail.

The appeal is dismissed. The impugned judgment and award is upheld. No order as to costs.

The amount in deposit with this Court be remitted to the Motor Accident Claims Tribunal concerned.

26-08-2004 **(B.S. Verma, J.) (P.C. Verma, J.)**
RCP